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Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 13. Original.

Ex parte: In the matter of JAMES S. BARTON KEY, *Petitioner.*

Brief for Respondents

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PRESS OF W. F. ROBERTS, WASHINGTON, D. C.

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BRIEF FOR RESPONDENTS.

The power of this Court to issue writs of mandamus to inferior courts is only incidental to the exercise of its appellate jurisdiction.

Kendall *vs.* U. S., 12 Pet., 524.
Ex parte Bradstreet, 7 Pet., 634.
Re Atlantic City R. R., 164 U. S., 633.
Ins. Co. *vs.* Comstock, 16 Wall., 258, 270.
Ex parte Russell, 15 Wall., 664, 670.

As no federal question within the meaning of the Code D. C., Sec. 223, is presented and the amount involved is too small to come to this court by writ of error, mandamus will not lie.

Ex parte Burdett, 127 U. S., 771.

We submit that the Burdett case negatives power to mandamus as incidental to the exercise of jurisdiction by

certiorari; but if such power exist the question resolves into whether or not *certiorari* would be granted to review a judgment of the Court of Appeals affirming the judgment below, and must be answered in the negative.

The amount involved is only $192.

The case originated before a justice of the peace and the plaintiff there, who was successful, has been dragged into the Supreme Court of the District of Columbia and thence into the Court of Appeals, and put to great expense and trouble in sustaining his judgment.

The question raised by the petitioner as the ground of his appeal, viz: the power of the court to enter a judgment against one of two defendants sued as co-partners, cannot arise in any other case, inasmuch as the Code D. C., which went into effect January 1, 1902, specifically provides in Sec. 1209:

> "In actions *ex contractu* against alleged joint debtors it shall not be necessary for the plaintiff to prove their joint liability as alleged in order to maintain his action, but he shall be entitled to recover, as in actions *ex delicto*, against such of the defendants as shall be shown by the evidence to be jointly indebted to him, or against one only, if he alone is shown to be indebted to him, and judgment shall be rendered as if the others had not been joined in the suit."

And the question now raised by the petition, viz: the right of appeal under the Code as originally passed, cannot arise in any other case, because the amendment to the Code, passed shortly after the dismissal of the petitioner's appeal, repealed one of the conflicting Sections and the Court of Appeals have since recognized the right of appeal in all cases. (See Ans. Par. 9.)

The case is thus unique in presenting, so far as the petitioner is concerned, only questions that cannot arise in any other case and in involving an amount which will hardly exceed the costs of these proceedings in this court, and yet the

petitioner, in effect, seeks to have this court assume jurisdiction by *certiorari* and issue the writ of mandamus in aid of that jurisdiction.

The appeal was fatally defective for lack of necessary co-party-appellant.

The judgment appealed from was against the petitioner and the surety on the undertaking on appeal from the justice of the peace (R. 5), and the appeal was by the petitioner alone without joining the surety, and without summons and severance. (R. 5-6.)

The motion to dismiss (R. 21) assigned this ground as well as lack of jurisdiction, and the objection was fatal.

Eastland *vs.* Jones, Minor, 275.
Thomas *vs.* Wyatt, 17 Miss., 308.
Humes *vs.* Third Nat. Bank, 54 Fed., 917.
Godfrey *vs.* Roessle, 5 D. C. App., 299.
Mason *vs.* U. S., 136 U. S., 581.
Hardee *vs.* Wilson, 146 U. S., 179.
Beardsley *vs.* Ry. Co., 158 U. S., 123.

The judgment of the Court of Appeals dismissing the appeal (R. 22) is *res judicata* of both grounds of objection, as both go to the question of jurisdiction.

The petition here does not mention the omission of necessary party and urges no ground for relief in that respect.

Nor could the omission of necessary party be cured by amendment.

Leave to amend was denied in *Mason vs. U. S., supra*, a

case involving ever $100,000, and the ruling there must be regarded as notice to the bar that strictness in the matter of proper parties to appeals would thereafter be required.

Nor does the record show any attempt to cure the defect.

Even were amendment possible, leave to amend would be a matter of discretion in the court below (*Pearson vs. Yewdall*, 95 U. S., 294; *Slater vs. Hamacker*, 15 D. C. App. 294), which could not be controlled by mandamus.

In *Pearson vs. Yewdall* this court held that amendment will not be allowed where the question presented had been many times decided and when to grant the amendment would only lead to unnecessary delay and expense; and, as we show later, the question raised by the bill of exceptions and appeal had not only been decided by the Court of Appeals adversely to the petitioner's contention prior to the Code D. C., but was directly controlled by Sec. 1209 of the Code, *supra*, enacted pending the suit.

With respect to the case of *Inland, etc., Co. vs. Tolson* (136 U. S., 572), where amendment adding sureties as plaintiffs in error was allowed just a few days before action in *Mason vs. U. S., supra*, the situation was peculiar, inasmuch as the judgment was of a double aspect, first against the defendant alone and then a recovery against him and the sureties on his undertaking on appeal, under a then recently adopted rule of court which, as well as the form of the judgment, counsel pleaded had not been brought to his notice, while here the judgment against the surety was pursuant to the act of 1895 and a rule of court thereunder of seven years standing.

Again, as the surety was a necessary party to the appeal, it is equally a necessary party to the petition for mandamus, and, being omitted, the petition must be dismissed for that reason irrespective of any other.

The ruling of the respondents upon the right of appeal was correct.

As the two sections of the Code were apparently conflicting, it was necessary to construe them so as to give both effect, if possible, and by the application of sound principles this was done We deem it unnecessary to repeat the argument contained in the opinions of the respondents (R., 25, 29) and merely submit here some considerations by way of reply to the contention of the petitioner.

Before the adoption of the Code there was no appeal from the judgment of the circuit court in cases appealed from justices of the peace.

Luchs *vs.* Jones, 1 McA., 345.
Hoeling *vs.* McCord, 20 D. C., 35.
Ex parte Redmond, 3 D. C. App., 317.
Sturges *vs.* Hancock, 4 D. C. App., 289.
Mitchell *vs.* Evans, 29 Wash. Law Rep., 399.

And no proceeding by way of certiorari to remove a case from a justice of the peace to the circuit court for trial in the first instance.

Hendley *vs.* Clarke, 8 App. D. C., 165.

The Code, as drafted by Mr. Justice Cox, amended by the bench and bar of this District and passed by the House of Representatives, contained Sec. 8, providing for the removal of cases of concurrent jurisdiction (involving fifty dollars or more) from justices of the peace to the circuit court by certiorari for trial in the first instance; Sec. 30, providing for appeal from judgments of justices of the peace to the circuit court in cases involving five dollars or more; Sec. 80, providing for the hearing of such appeals in a summary way, *de novo*, unless a jury trial were demanded; Sec. 82, prohibiting any further appeal in such cases, and Sec. 226, providing for appeal from any final order, judgment, or decree of the Supreme Court of the District of Columbia to the Court of Appeals.

The quoted clause in Sec. 226 as finally passed, upon which

the petitioner relies, was one of a number of amendments hurried into the Code at the time of its passage in the Senate (ostensibly as being favorably reported by the committee, but in fact against the expressed protest of the chairman that it was not so) without consideration or debate (See Cong. Record, 1900–1901, p. 3495), and forced on the Senate and House as a condition of allowing the Code to pass. Sec. 82 was not sought to be amended or stricken out, but remained as the deliberate will of Congress, expressing the judgment of the bench and bar of this District.

It is thus apparent that the insertion of the quoted clause in Sec. 228 was a plain legislative blunder.

It could not be presumed that Congress, in the face of the specific and emphatic prohibition of Sec. 82, could have intended, by this inserted clause in Sec. 226, to burden the Court of Appeals with the review of these trifling cases originating before justices of the peace, which by Sec. 80 were directed to be tried in the circuit court summarily, and the Court of Appeals rightfully held that the general language of Sec. 226 must be limited by the particular language of Sec. 82 and, as so limited, held to apply to cases appealed by certiorari (Sec. 8) for trial in the first instance in the circuit court, where pleadings and issues could be required and the trial would be by jury, with opportunity for bill of exceptions to bring only errors of law to the Court of Appeals for review in the ordinary and proper manner.

The petitioner contends that the supposed rule of construction that in case of repugnancy the last part of the statute is to be taken to express the intention of the law maker (which, for brevity, may be styled the last clause rule) must override this solution of the difficulty, cast upon the Court of Appeals the indignity of sitting as a *pie poudre* tribunal and permit one litigious small suitor to compel the other to shake the dust off his feet in three courts, with the ultimate possibility of being dragged to this highest tribunal in the land by *certiorari*, for

it is upon the jurisdiction of this Court by *certiorari* that the petitioner necessarily relies in his application for mandamus.

As the Court of Appeals said in *ex parte Redmond, supra*, nothing short of an express provision, referring to such cases in terms, would justify the conclusion that Congress could intend to establish such a burdensome, inconvenient and costly system, and we submit that not only must such a statute be express but, as well, clear, unequivocal, unambiguous and not contain a solemn and emphatic negative; and such a statute was not presented until Congress amended the Code by striking out Sec. 82, leaving Sec. 226 standing unqualified by any other provision.

In view of all these considerations, the supposed last clause rule could have no application here, for all the text-writers and authorities have treated it as purely arbitrary and fanciful and merely a final resort when all other considerations fail.

But the last clause rule is not sound nor established by authority.

It is undeniable that the reason of the rule is fanciful and opposed to fact, for all parts of a statute are enacted at the same instant; and an examination of the antecedents of the rule shows it to be unsupported by precedent, questioned by text writers and repudiated by courts that have not blindly accepted the announcement of it in Bacon's Abridgement, where it is first found.

Bacon cites, as his authority, the case of Attorney General *vs.* the Governor and Company of the Chelsea Water Works, Fitzgibbon, 195, the report of which is very brief:

> "In Scacc. Per Reynolds, chief baron, Comyns and Thomson, barons. The question being upon the construction of the late land tax act; it was held that where the proviso of an act of Parliament is directly repugnant to the purview, the proviso shall stand and be a repeal of the purview, as it speaks the last intention of the makers; and it was compared at the bar to a will in which the latter part, if inconsistent with the former, shall supersede and revoke it."

[With reference to Fitzgibbon, see Marvin's Legal Bibliography, 311: "Most of the cases in this volume are said to be incorrectly reported and of no authority." See also The Reporters, Wallace, 427].

It was held, however, in other cases, that a saving clause (likewise subsequent in position) totally repugnant to the purview, must be rejected.

So that mere position of the proviso in the act is seen not to be a sound reason for the case in Fitzgibbon and that being a case merely of a repugnant proviso (if the reporter can be relied on) there was no authority for the broad last clause rule as announced by Bacon; and there seems to be no other case in the English reports.

Holt, Ch. J., in 6 Mod. 287, a case involving two repugnant orders respecting the poor of a parish, made at the same justices' sessions, is reported: "'If they should generally refer to the same sessions I don't know which to take for law.' And he quoted a case of the Town of Colchester here some years ago exactly like this; and for that the second order did not expressly repeal the first order and that the justices did return them both as orders the second order was quashed and the first set up."

The Fitzgibbon case is criticised by Chancellor Kent, who could see no reason for the distinction between a saving clause and a proviso. 1 Com. 462.

See also Farmers Bank *vs.* Hale, 57 N. Y. 59, where a repugnant later clause was construed to be a proviso and for that reason held to govern a previous clause, the court saying there seemed to be a settled distinction between the effect of a repugnant saving clause and a repugnant proviso, whether any sound reason existed for the distinction or not.

Bishop (Written Law, 63–65) contends that this last clause rule is unsupported by reason or authority.

Sutherland (Statutory Construction, Secs. 220–221) treats the rule as doubtful and says that it and the reason for it have been criticised.

And see State *vs.* Heidorn, 74 Mo. 410, where the reasonable view is taken and it is said that *if two clauses in the same statute are irreconcilably repugnant they nullify each other.*

Sams *vs.* King, 18 Fla. 557 (particularly applicable here), where a subsequent provision was qualified to give it effect consistent with previous provisions which the court deemed to be more consistent with sound policy.

And State *vs.* Williams, 8 Ind. 191, where the first clause was clear and explicit and sustained as against a later which was not.

An examination of the cases cited by text writers in support of this supposed rule fails to disclose a single case of repugnancy being resolved by its unaided application.

It will be found, if the inquiry be deemed profitable, that in all of the cases cited in the books, the repugnancy was resolved without the aid of the rule or that reference to the rule was *obiter;* but it seems sufficient for present purposes to refer only to the cases cited in the brief for petitioner.

Powers *vs.* Barney, 5 Blatch., 202. The court reached the same result by application of the rule that a tariff act is to be construed in favor of the importer, a rule which would have controlled even had the repugnant clauses been reversed in position in the act.

State *vs.* Hull, 5 Rich., 120. Last clause rule not invoked.

Elliot *vs.* Lochnane, 1 Kan., 135. A case of subsequent statute.

Ryan *vs.* State, 5 Neb., 276. Last clause rule not invoked by counsel. The last clause of the act in question was in effect a proviso: "This act shall not in any way affect sections 49 and 50 of the general revenue laws as found in the Revised Statutes of 1873;" and it was held that these provisions remained in force, a result reached by considerations other than mere position of the clause.

Gibbons *vs.* Brittenum, 56 Miss., 232. The conflict was

between sections of a codification adopted by the legislature and approved by the governor at different times as separate acts and the doctrine of subsequent statute was applied.

Packer *vs.* R. R. Co., 19 Pa. St., 211. The court held all the statute consistent.

Brown *vs.* County Commissioners, 21 Penna. St., 37. A case of subsequent statute.

Southwark Bank *vs.* Commonwealth, 26 Penna. St., 446. A case of subsequent statute.

Ex parte Ray and Defoe, 45 Ala., 15. The apparent repugnancy was resolved without the aid of the rule.

Harrington *vs.* Rochester, 10 Wend., 547. A case of subsequent statute.

Commercial Bank *vs.* Chambers, 8 Sm. & M., 9. A case of subsequent statute.

Quick *vs.* Whitewater Township, 7 Ind., 570. The question before the court was satisfactorily resolved without the aid of the last clause rule.

Albertson *vs.* State, 9 Neb., 429. The apparent conflict was resolved by application of the rule that a special provision will prevail over a general one.

Sams *vs.* King, 18 Fla., 557. See *supra*. The court says:

> "We cannot think that the legislature after plainly giving the right to contest the regularity of the proceedings * * * intended by the general terms used in the last clause of Sec. 65 to deny this right."

Branagan *vs.* Dulaney, 8 Colo., 408. The apparent conflict was resolved without the aid of the last clause rule and that rule was only casually referred to in connection with a suggested possible intention of Congress which the court did not seriously consider.

Gee *vs.* Thompson, 10 La. Ann., 657. The court satisfactorily resolved the supposed repugnancy and did not mention the last clause rule.

Peete *vs.* Nalle, 30 La. Ann. Pt. II, 949. The repugnancy

was between a section of the Revised Statutes and a section of the Civil Code, the latter of which, by provision in the Revised Statutes, prevailed in case of conflict. The last clause rule is not mentioned.

Hamilton *vs.* Buxton, 6 Ark., 24. Merely applied a statutory rule of interpretation and did not refer to the last clause rule.

So, there being no such rule of construction, if Secs. 82 and 226 were irreconcilably repugnant they nullified each other, the law stood as it did before the passage of the Code, and appeal did not lie. (See opinion on motion for rehearing, R., 29).

The evidence, as presented by the bill of exceptions established a partnership between Key and Scott, the trial court should have directed a verdict against both defendants, Key cannot, in any event, take advantage of the error of the trial court in this respect and the judgment against him would necessarily stand.

At the trial the defendants, in effect, demurred to the plaintiffs evidence, which consisted of a letter from Key to Scott expressing the terms of their agreement (R. 8), a bill in equity by Scott against Key, setting up the agreement substantially as expressed in Key's letter (R. 10), a letter from Scott to Moses & Sons declaring his financial interest in the enterprise (R. 16), a letter from Scott to Key referring to himself (Scott) as Key's partner (Key's testimony R. 15) and the testimony of witnesses; from which sources the following facts appear:

Key had no money (his own testimony, R. 14.).

Scott was to, and did, become surety on the bond to secure the landlord [Key's letter and testimony (R. 14) and Scott's bill].

Scott was to, and did, furnish all the capital for the enterprise (Key's testimony, R. 14).

Scott was to invest $5,000 in repairing, improving and opening the hotel (Key's letter). Scott was to advance not to exceed $5,000 for the purpose of necessary repairs and improvements (Scott's bill).

This $5,000 to be repaid out of the rebate in rent on account of improvements and repairs (Key's letter and Scott's bill).

The finances to be handled by a treasurer or cashier to be appointed or approved by Scott (Key's letter). Scott, by his agent acting as treasurer or cashier to handle all the receipts of the business (Scott's bill).

All payments to be made on joint check of such treasurer or cashier and Key (Key's letter).

Scott to receive for his own use one-half of the profits (Scott's bill). Scott to receive a sum of money equal to one-half of Key's profits (Key's letter).

Scott advanced, to be applied in stocking, equipping and preparing the hotel, further sums amounting to $3,000 and indorsed notes for same purpose to amount of $2,000 (Scott's bill).

Scott declares that he is financially interested with Key in the enterprise (Scott's letter to Moses).

Scott resided at the hotel (Daly, R. 9) but his name did not appear on register or guests' ledger (Key, R. 15); Key habitually introduced Scott as his partner (Daly, R. 9); Scott stated he was going to bring his cousin (Mrs. Page) there to act as cashier and sign checks (Daly, R. 9, 10); Scott referred to the bar and bartender as his (Daly, R. 10); Key and Scott had a falling out and Scott insisted on putting some one else in Key's place and having direction of matters (Key, R. 14, 15) and after this falling out Key told the bartender he was going, shook hands with him, said good bye and left the hotel (Daly, R. 9), Scott thereupon told Daly to continue and he would see that everything went right and that Mrs. Page would

receive the money (Daly, R. 9) and Mrs. Page acted as cashier and turned the receipts in to Scott (Daly, R. 9.)

The only thing lacking is the label PARTNERSHIP.

> Where the transaction is a mere device to obtain the benefits of a partnership without incurring its responsibilities, whatever the parties may call it, it will be construed to be a partnership.
> 17 Enc. Law, 853.

Formerly it was held that sharing profits, *ipso facto*, constituted partnership as to third persons, but this rule has been relaxed to the extent, first, of allowing an exception where the share of profits is made the measure of compensation for services and, later, where the share of profits is in lieu of interest for a loan of money.

The rule is now stated that sharing profits is *prima facie* evidence of partnership and the burden is on the party denying partnership to bring the case within one of these two exceptions.

The latest leading case is *Meehan* vs. *Valentine*, 145 U. S., 611, where this court, after having the matter under advisement for nearly two years, reviewed all the authorities and left little to be said on the subject. An application of the principles there announced necessarily characterizes the relations of Key and Scott as a partnership as to third persons.

Each and all of the features of the case here are inconsistent with the theory of *mere loan*. Note the distinctions drawn by the majority of the court in holding the Meehan case within the second exception:

> In some of the cases most relied on by the plaintiff, the person held liable as a partner furnished the *whole capital* on which the business was carried on by another, *or else contributed part of the capital and took an active part in the management of the business.* (Citing cases). And in Mollwo *vs.* Court of Wards, above cited, after speaking of a contract of loan and security, in which

no partnership was intended, it was justly observed: "If cases should occur where any persons, under the guise of such an arrangement, are really trading as principals, and putting forward as ostensible traders, others who are really their agents, they must not hope by such devices to escape liability, for the law in cases of this kind will look at the body and substance of the arrangements, and fasten the responsibility on the parties according to their true and real character." (Citation). But in the case at bar no such element is found.

Throughout the original agreement and the renewals thereof, the sum of $10,000 paid by Perry to the partnership, and for which they *gave him their promissory notes*, is spoken of as a loan, for which the partnership was to pay him legal interest at all events and also pay him one-tenth of the net yearly profits of the partnership business, if those profits should exceed the sum of $10,000. The manifest intention of the parties, as apparent upon the face of the agreements, was to create the relation of debtor and creditor, and not that of partners. Perry's demanding and receiving accounts and payments yearly was in accordance with his right as a creditor. There is nothing in the agreement itself, or in the conduct of the parties, to show that he exercised any other relation. *He never exercised any control over the business.*

HERE, Scott was to, and did, furnish *all of the capital*, even the *sine que non* of the lease, the *bond to the landlord.*

The $5,000 was not characterized even by the parties themselves as a loan, but as an *investment* in repairing and opening the hotel (Key's letter) or as an advance for the purpose of necessary repairs and improvements (Scott's bill) and Scott, in his letter to Moses, says he is financially interested with Key in the enterprise.

Where one lends money to another expressly for use in a certain business and for no other use whatsoever, and that other is to make regular statements of the condition of the business, the two dividing equally the yearly net profits, they are partners.

Hackett *vs.* Stanley, 14 Daly, N. Y. 210.

17 Enc., 853.

The $5,000 was not to be repaid by Key out of his own resources for he had none, but out of the proceeds of the business—the rebate of the rent, in consideration of the improvements and repairs, to go to Scott instead of to the landlord. *Key's letter, which must be accepted as the best evidence of the agreement, contains no personal undertaking on his part to repay the $5,000.*

See 17 Enc., 852.

Scott was to control the finances of the business through his agent (treasurer or cashier) who was to sign checks jointly with Key for all expenditures. This of itself is a controlling test of partnership.

17 Enc., 843-4.

Keys's expression, Scott to receive a sum of money equal to one-half Key's profit, is equivalent to Scott's expression, to receive for his own use one-half of the profits.

> It has been laid down in quite a large number of cases that there must be a sharing in losses as well as in profits to constitute a partnership, but the later and better rule would seem to be that a community of interest in the profits as such is sufficient, community of interest in the profits meaning a proprietorship, or a property right in them from the start, as much in one as in the other, as distinguished from a personal claim by the one against the other. And whether it is such depends upon no arbitrary use of phrases, *but may apply as well to the receipt of a certain sum equal to a share of the profits, as to a share of the profits by that name.*
>
> 17 Enc., 841.
> Parker *vs.* Canfield, 37 Conn., 266.

"Actual participation in the profits as principal we think creates a partnership as between the parties and third persons, whatever may be their intention in that behalf, and not withstanding the dormant partner was not expected to participate in the loss beyond the amount of the profits. Every man who has a share of

> the profits of a trade or business ought also to bear his share of the loss, for the reason that in taking a part of the profits, he takes a part of the fund of the trade on which the creditor relies for payment. (Citing cases.) Actual partnership as between a creditor and the dormant partner, is considered by the law to subsist where there has been a participation in the profits although the participant may have expressly stipulated with his associates against all the usual incidents to that relation."
>
> Berthold *vs.* Goldsmith, 24 How., 536.

Scott's bill was, in effect, a bill by one partner against the other, the ultimate object of which was an accounting and settlement of partnership affairs.

The right to an accounting is one of the incidents of partnership.

> "Unless the supposed dormant partner is in some way interested in the profits of the business as principal, it is plain that he cannot bring suit as a partner and go into equity and compel an accounting; nor can it be held that he has any such lien on the profits as a court of equity may enforce; and if not, his condition is that of an ordinary creditor, and he must pursue his remedy against his employer."
>
> Berthold *vs.* Goldsmith, *supra*.

Counsel for defendant rely on cases where the question was partnership *inter se*. *Vide* London Assn. *vs.* Drennen, 116 U. S., 472. As between themselves partnership cannot exist against intention, but as to third persons partnership will be declared according to the effect of the agreement between the parties and intention ignored. Meehan *vs.* Valentine, *supra*.

See also recent parallel cases—

Hull *vs.* Barth, 62 N. Y. S., 946.
1st Nat. Bank *vs.* Ballard, 19 Ohio C. C. R., 63.
Nat. Bank *vs.* Galladet, 122 N. Y., 655.
Firt Co. *vs.* Reams, 105 N. C., 283.

Finally, the ruling of the trial court upon the question of the right of recovery against one of the alleged partners was in accord with the settled construction of R. S. D. C., Sec. 827, which provides:

> "Where money is payable by two or more persons jointly or severally, as by joint obligors, covenantors, makers, drawers, or indorsers, one action may be sustained and judgment recovered against all or any of the parties by whom the money is payable, at the option of the plaintiff."

In Presbrey *vs.* Thomas, 1 App. D. C., 171, the court said:

> "The liability of partners on partnership contracts, except it be of a special nature, is several as well as joint, and the assumpsit is made by all, and by each. Barry *vs.* Foyles, 1 Pet., 311, 317." (See also Chesley *vs.* Riley, 20 D. C., 166, and Burdette *vs.* Bartlett, 95 U. S., 637). "But this case is clearly within the express provision of Sec. 827 of Rev. Stat. Dist. Col., where it is provided" (*vide supra*).
>
> "In thus providing for the case of money payable by two or more persons is clearly meant where there is apparent liability of two or more persons, according to the terms or import of the contract sued on, and not as may be shown by the proof; for the contract may import an obligation or promise by two or more persons, and yet the proof show the money to be payable by and recoverable of one of the parties only. Bibb *vs.* Allen, 149 U. S., 481, 502, 503, 504."

And in Harris *vs.* Leonhardt, 2 App. D. C., 318, it was held that, under R. S. D. C., Sec. 827, the entry of judgment against one of two defendants sued jointly, does not merge the cause of action nor bar the recovery of a subsequent judgment in the same suit against the other.

The Code D. C., however, had gone into effect before the trial of this case in the Circuit Court and Sec. 1209 specifically provided, under the head of *evidence*, that:

> "In actions *ex contractu* against alleged joint debtors it shall not be necessary for the plaintiff to prove their joint liability as alleged in order to maintain his action, but he shall be entitled to recover, as in actions *ex delicto*, against such of the defendants as shall be shown by the evidence to be jointly indebted to him, or against one only, if he alone is shown to be indebted to him, and judgment shall be rendered as if the others had not been joined in the suit."

This provision, affecting only the rules of evidence or procedure, applied to pending causes and coutrolled this case.

Marx *vs.* Hanthorn, 148 U. S., 172, 181.

Furthermore, the R. S. D. C. (Sec. 775), provided in cases of appeal from justices of the peace, that:

> "The Supreme Court shall in a summary way hear the allegations and proofs of both parties, and determine upon the same according to law and equity and right of the matter,"

with right to demand trial by jury.

And the Code contained a similar provision (Sec. 80):

> "On such appeal the Circuit Court shall, in a summary way, hear the case *de novo* upon the proofs and allegations of the parties, and determine the same according to law and the equity and right of the matter; but either party may demand a trial by jury."

As pleadings are not required in these cases and technicality is dispensed with, it is apparent that (aside from all other considerations) Key being admittedly responsible for the account sued on, *the equity and right of the matter* required judgment to be entered against him.

We respectfully submit that the rule must be discharged and the petition dismissed.

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